Supreme Court, U.S.
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No. 87-1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MOHAN L. MEHTA & RADHA R.M. NARUMANCHI,
Petitioners,

vs.

THE BOARD OF TRUSTEES OF THE CONNECTICUT STATE UNIVERSITIES, MICHAEL ADANTI, ALAN H. LEADER, DAVID C. NEWTOWN, KERRY GRANT, BARBARA BARD, MICHAEL K. BECKER, FRANK E. MUSKA, JERRY BANNISTER, MICHAEL PERNAL, DORIS GRISCOM, Individually and in Their Official Capacities,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	Page
Objections To Jurisdiction....	1
Other Objections of Respondent	3

TABLE OF AUTHORITIES

	Page
Flaherty v. Coughlin 713 F. 2d 10, 13 (2d Cir. 1983).....	6
Payne v. McLemore's Wholesale & Retail Stores 654 F. 2d. 1130, 1144 (5th Cir. 1981).....	5
Singelton v. Wulff, 428 U.S. 106, 121 (1976)..	5
State of California, Department of Education v. Bennett, 843 F. 2d 333, 339 (9th Cir. 1988).....	4
Vintero Corp, v. Corporation Venezolana De Fomento, 675 F. 2d 513, 515 (2d Cir. 1982).....	5
Washington v. Davis, 426 U.S. 229, 238 (1976)..	4
C. Wright, A. Miller & Kane, Federal Practice and Procedure Vol 10A, p. 518.	4

This Reply Brief is submitted in response to Respondents' Brief in Opposition filed with this Court.

OBJECTIONS TO JURISDICTION

Respondents in their Brief in Opposition objected to the jurisdiction of this Court on the basis that Petitioners did not file the petition for writ of certiorari within 90 days from the time the Petition for Rehearing was denied.

They now question the timeliness of the Petition for Rehearing in the Court of Appeals. Both objections are without merit. Petitioners fully complied with Supreme Court Rule 20.4. The judgment of the U.S. Court of Appeals was entered on December 9, 1987. Within 14 days from that day, on December 24, 1987, Petitioners filed their petition for rehearing and not on December 29, 1987, as alleged by Respondents.

Petitioner's attorney verified his own records and the Court of Appeals records and obtained a certified copy of the Docket Sheet. The relevant item in the Docket Sheet reads "Appellants Mohan L. Mehta & Radha R.M. Narumanchi petition for rehearing filed w/pfs." against date 12-24-87.

Since a timely petition for rehearing was filed and entertained by the Court of Appeals and not rejected as untimely, and since Respondents failed to object any alleged untimeliness when the petition for rehearing was filed, their objection now is meritless.

Respondents also failed to properly calculate the 90 day period. The petition for rehearing was denied on March 1, 1988 and the time for filing the writ petition then commenced. However, the 90th day fell on a federal holiday, the Memorial Day, May 30, 1988. The Supreme Court also was closed on that

day. Under Rule 29.1 of the Supreme Court Rules, Petitioner filed the petition on the following day, May 31, 1988. The Petition was duly accepted by the Clerk of the Supreme Court. Respondents' objections are totally baseless.

OTHER OBJECTIONS OF RESPONDENTS

The first reason propounded by Respondents for the denial of the petition is that the Petition raised new issues not presented below. They do not dispute that the granting of the summary judgment was questioned. Petitioners contend that the failure to have discovery was fully encompassed in the objections to the summary judgment. Further, once the summary judgment was granted and the case dismissed, there is no way plaintiffs could raise an issue with the District Court. The prior

appellate counsel did not fully develop the issues before the Second Circuit, but questioned the validity of the summary judgment. Since a substantial federal procedural issue is involved, this legal issue can be decided by this Court.

Even assuming the discovery issue to be a new one, this Court's power to notice "plain error" is evident from Rule 40(1)(d)(2) of the Supreme Court Rules. At times the Court has raised a new question sua sponte and directed the parties to argue it. C.Wright, A. Miller & Kane, Federal Practice and Procedure, Vol 10A, p. 518. This Court noticed plain error in Washington v. Davis, 426 U.S.229, 238 (1976) and other cases.

The ninth Circuit recently dealt with this issue in State of Cal., Dept. of Educ. v. Bennett, 843 F. 2d 333, 339 (9th Cir. 1988). After stating the general principle that appellate courts do not, as a rule, consider an issue for

the first time on appeal, the Court summarized three execptions.

> "(1) 'the 'exceptional' case in which review is necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process';
> (2) 'when a new issue arises while appeal is pending because of a change in the law';
> (3) 'when the issue presented is purely one of law and either does not depend one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed'."

The citations were omitted in the original. Other courts have also followed these exceptions. Vintero Corp. v. Corporacion Venezolana De Fomento, 675 F. 2d 513, 515 (2d Cir. 1982); Payne v. McLemore's Wholesale & Retail Stores, 654 F. 2d 1130, 1144 (5th Cir. 1981). Further, this Court has previously ruled that federal appellate courts may resolve an issue not raised in the District Court where the proper resolution is beyond any doubt or where an injustice might otherwise result. Singelton v. Wulff, 428 U.S. 106, 121 (1976).

The three exceptions enunciated by the ninth Circuit in State of Cal. are fully applicable in this case, and the writ should be issued.

In relation to a prisoner discipline matter, the Second Circuit analyzed the need for discovery before summary judgment in Flaherty v. Coughlin, 713 F. 2d 10, 13 (2d Cir. 1983). In this case, the facts alleged in the amended complaint at least gave rise to a colorable suspicion of retaliation. "Such a claim sill support at least documentary discovery". Id. @ p. 13. Since no discovery was ever had in this case, this court should give authoritative ruling on this procedural issue.

Respondents also claimed that petitioners had three months time to conduct discovery and that they failed to do so. Petitioners diligently pursued their case but were overburdened with at least 11 motions in that three month

period and the docket sheet shows 32 entries in that period. In addition to this activity, petitioner Narumanchi was also pursuing his individual case before the same Judge and was preparing for trial on his title VII claim. Petitioners were prevented from pursuing discovery and they did not waive the right to have discovery.

Respondents finally argue that Petitioner had a wide array of contractually bargained for rights under the collective bargaining agreement and that there was no denial fo due process. Even if that be true, these procedures were enforced unequally. The bias of the enforcing authorities was demonstrated and petitioners did not receive the constitutional minimum under the due process clause. These issues will be fully discussed in Petitioners' Brief once the Writ is issued.

Respectfully submitted.

New York, N.Y.

August 10, 1988

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